STATE OF MICHIGAN

COURT OF APPEALS

ASSOCIATED BUILDERS AND CONTRACTORS-SAGINAW VALLEY AREA CHAPTER,

Plaintiff-Appellee/Cross-Appellant,

v

KATHLEEN M. WILBUR, Director of the Department of Consumer & Industry Services, and NORMAN W. DONKER, Midland County Prosecuting Attorney,

Defendants/Cross-Appellees,

and

MICHIGAN CHAPTER of the NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION,

Defendant/Intervenor-Appellant/ Cross-Appellee,

and

MICHIGAN MECHANICAL CONTRACTORS ASSOCIATION, MICHIGAN CHAPTER OF SHEET METAL & AIR CONDITIONING CONTRACTORS, and MICHIGAN STATE BUILDING & CONSTRUCTION TRADES COUNCIL,

Defendants/Intervenors-Appellants/ Cross-Appellees,

and

MICHAEL D. THOMAS, SAGINAW COUNTY PROSECUTOR,

Intervenor.

UNPUBLISHED
August 5, 2003

No. 234037
Midland Circuit Court
LC No. 00-002512-CL

Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

Plaintiff brought this action for declaratory and injunctive relief, challenging the constitutionality of the Prevailing Wage Act (PWA), MCL 408.551 *et seq.*, (1965 PA 166), as vague and as constituting an unconstitutional delegation of legislative authority to private parties, specifically, unions and union contractors. The circuit court dismissed plaintiff's vagueness claim on defendants' motions for summary disposition, but allowed the delegation of legislative authority claim to proceed. Defendants interlocutorily appeal by leave granted the latter ruling, and plaintiff cross-appeals as of right the dismissal of its vagueness claim.

On the present record, we conclude that there is no actual controversy. We conclude that because the injuries plaintiff seeks to prevent are at this point merely hypothetical, this Court may not proceed to reach the question of the PWA's constitutionality. We thus reverse the circuit court's denial of summary disposition of the delegation of legislative authority claim and, in the cross-appeal, affirm the dismissal of the vagueness claim.

I

The PWA is discussed in *Western Michigan Univ Bd of Control v State*, 455 Mich 531, 533; 565 NW2d 828 (1997):

> Michigan's prevailing wage act is generally patterned after the federal prevailing wage act, also known as the Davis-Bacon Act, 40 USC 276a *et seq.* Both the federal and Michigan acts serve to protect employees of government contractors from substandard wages. Federal courts have explained the public policy underlying the federal act as:
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> > "protect[ing] local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area" . . . [and] "giv[ing] local labor and the local contractor a fair opportunity to participate in this building program." [*Universities Research Ass'n, Inc v Coutu*, 450 US 754, 773-774; 101 S Ct 1451; 67 L Ed 2d 662 (1981).]
> >
> > The purposes of the Davis-Bacon Act are to protect the employees of Government contractors from substandard wages and to promote the hiring of local labor rather than cheap labor from distant sources. [*North Georgia Bldg & Construction Trades Council v Goldschmidt,* 621 F2d 697, 702 (CA 5, 1980).]
>
> The Michigan prevailing wage act reflects these same public policy concerns. Through its exercise of the sovereign police power to regulate the terms and conditions of employment for the welfare of Michigan workers, the Michigan Legislature has required that certain contracts for state projects must contain a

provision requiring the contractor to pay the prevailing wages and fringe benefits to workers on qualifying projects. [*Western Michigan*, 455 Mich at 530-531.]

The PWA,[1] section 4, provides:

> The commissioner [of the Department of Consumer & Industry Services] shall establish prevailing wages and fringe benefits at the same rate that prevails on projects of a similar character in the locality under collective agreements or understandings between bona fide organizations of construction mechanics and their employers. Such agreements and understandings, to meet the requirements of this section, shall not be controlled in any way by either an employee or employer organization. If the prevailing wages and fringe benefits cannot reasonably and fairly be applied in any locality because no such agreements or understandings exist, the commissioner shall determine the rates and fringe benefits for the same or most similar employment in the nearest and most similar neighboring locality in which such agreements or understandings do exist. The commissioner may hold public hearings in the locality in which the work is to be performed to determine the prevailing wage and fringe benefit rates. All prevailing fringe benefit rates determined under this section shall be filed in the office of the commissioner of labor and made available to the public. [MCL 408.554.]

Section 2 provides in pertinent part:

> Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics . . . and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. . . . [MCL 408.552.]

Section 3 provides:

> A contracting agent,[2] before advertising for bids on a state project, shall have the commissioner determine the prevailing rates of wages and fringe benefits for all

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[1] The PWA contains eight sections, MCL 408.551–408.558. Primarily at issue in this case is § 4, MCL 408.554, quoted *supra*.

[2] The term "contracting agent" is defined in MCL 408.551(c) as:

> any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor.

> classes of construction mechanics called for in the contract. A schedule of these rates shall be made a part of the specifications for the work to be performed and shall be printed on the bidding forms where the work is to be done by contract. If a contract is not awarded or construction undertaken within 90 days of the date of the commissioner's determination of prevailing rates of wages and fringe benefits, the commissioner shall make a redetermination before the contract is awarded. [MCL 408.553.]

Section 5 provides:

> Every contractor and subcontractor shall keep posted on the construction site, in a conspicuous place, a copy of all prevailing wage and fringe benefit rates prescribed in a contract and shall keep an accurate record showing the name and occupation of and the actual wages and benefits paid to each construction mechanic employed by him in connection with said contract. This record shall be available for reasonable inspection by the contracting agent or the commissioner. [MCL 408.555.]

Section 6 provides:

> The contracting agent, by written notice to the contractor and the sureties of the contractor known to the contracting agent, may terminate the contractor's right to proceed with that part of the contract, for which less than the prevailing rates of wages and fringe benefits have been or will be paid, and may proceed to complete the contract by separate agreement with another contractor or otherwise, and the original contractor and his sureties shall be liable to the contracting agent for any excess costs occasioned thereby. [MCL 408.556.]

Section 7 provides:

> Any person, firm or corporation or combination thereof, including the officers of any contracting agent, violating the provisions of this act is guilty of a misdemeanor. [MCL 408.557.]

II

Associated Builders and Contractors is a non-union trade association with more than two-hundred members in thirteen Michigan counties, including contractors, subcontractors, builders, and others in the construction industry. Plaintiff in the instant case is the Saginaw Valley Area Chapter of Associated Builders and Contractors (hereafter ABC).

Defendant Kathleen Wilbur is the Director of the Department of Consumer Industry & Services (CIS), the department charged with overseeing the PWA, and defendant Norman Donker is Midland County's Prosecuting Attorney.[3] Defendant Michigan State Building &

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[3] Plaintiff's complaint alleged that the CIS' authority included the determination and (continued…)

Construction Trades Council (MSBCTC), intervened by stipulation. Three union contractor associations intervened by motion granted: Michigan Chapter of the National Electrical Contractors Association, Inc. (NECA), Michigan Mechanical Contractors Association (MCA), and Michigan Chapter of Sheet Metal & Air Conditioning Contractors National Association (SMACNA).

Defendant Donker and defendant-intervenor MSBCTC filed motions under MCR 2.116(C)(4), (8) and (10), asserting, inter alia, that plaintiff's complaint should be dismissed in its entirety for failing to present an actual controversy.[4] Defendant Wilbur moved for summary disposition under MCR 2.116(C)(7), (8) and (10), and attached an affidavit of Judith Huhn, a supervisor in the Wage and Hour Division responsible for assisting in administering the PWA, which stated in part:

> 3. Section 2 of the Prevailing Wage Act requires the payment of prevailing wage and fringe benefit rates to construction mechanics employed on state projects which are entered into pursuant to advertisement and invitation to bid, and which are sponsored or financed in whole, or in part, by the State.
>
> 4. Section 4 of the Prevailing Wage Act requires the Department of Consumer and Industry Services to establish prevailing wage and fringe benefit rates at the same rate that prevails on projects of a similar character in the locality under collective bargaining agreements or understandings between bona fide organizations or construction mechanics and their employers.
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> 5. The geographic area covered by collective bargaining agreements is usually on a county-wide basis.
>
> 6. CIS annually determines prevailing wage and fringe benefit rates from collective bargaining agreements submitted to the Department and from rate survey reports which represent collectively bargained rates of pay for construction mechanics.
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> 8. The prevailing wage and fringe benefit rates determined by CIS correspond to job classifications which are derived from rate surveys and collective bargaining agreements. If a question arises over an appropriate job classification, CIS relies on six sources of information to determine the appropriate classification. These include the applicable collective bargaining agreement, the Dictionary of Occupational Titles, consultation with the Bureau of Construction Codes which license the various trades, consultation with trade representatives of unions, consultation with contractors and subcontractors, and consultation with the United States Department of Labor, Bureau of Apprenticeship and Training.

(…continued)

enforcement of prevailing wage and fringe benefits rates, and that defendant Donker "is charged with the enforcement and prosecution of criminal statutes, such as Michigan's Prevailing Wage Act, in Midland County, Michigan."

[4] Donker argued that the circuit court thus lacked jurisdiction under MCR 2.605(A).

> 9. Section 5 of the Prevailing Wage Act also requires the contractor and subcontractor to post on the construction site prevailing wage and fringe benefit rates to be paid on prevailing wage projects.

The circuit court denied defendant Donker's motion for summary disposition, concluding that plaintiff had met the actual controversy requirement of MCR 2.605(A).[5]

NECA, MCA and SMACNA moved for summary disposition under MCR 2.116(C)(4) and (8). After additional briefing, the court heard Wilbur's and the intervernor-defendants' motions for summary disposition and granted the motion in part, dismissing plaintiff's vagueness challenge, and denied plaintiff's challenge to the PWA as an unconstitutional delegation of legislative authority.

This Court granted defendant-intervenors' delayed application for leave to interlocutorily appeal the denial of summary disposition of the delegation of legislative authority claim. Plaintiff ABC cross-appealed the dismissal of its vagueness challenge.

III

This Court reviews the circuit court's summary disposition determinations de novo. *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (1999). The constitutionality of a statute is a

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[5] The circuit court relied in part on two affidavits plaintiff submitted, its opinion stating:

> In the immediate case, the Prosecuting Attorney insists that there never has been a request and that there is no present request to enforce the criminal sanctions of the PWA. The Prosecuting Attorney and CIS each acknowledged their legal obligation to enforce constitutionally valid acts of the legislature during oral argument. Counsel for both the Prosecuting Attorney and CIS also acknowledged, however, that they had not analyzed ABC's specific challenge to the PWA and were not prepared to take a position on the constitutional merits of ABC's challenge to the PWA.
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> ABC has furnished the affidavits of Ronald Bauer, President of RCL Construction, Co., Inc. and that of Richard Johnson, President of J.E. Johnson Contracting, both ABC members, articulating in paragraph 6 concrete risks of violations of the PWA as a result of allegedly random changes to PWA rates, the lack of definition of PWA projects and the absence of PWA statutory definitions for statutory language that may be material to enforcement of the criminal sanctions. As a result, this Court concludes that the risks of enforcement of the statute together with the asserted character of the potential for violations of the PWA, presents a justiciable controversy.

In our opinion, neither the Johnson or Bauer affidavits established that there was an actual controversy. On appeal, plaintiff does not rely on either the Bauer or Johnson affidavit, but rather, relies on the affidavits of Goulet and Tenaglia, which are discussed *infra*, and about which we arrive at the same conclusion.

question of law this Court reviews de novo, *Dep't of State v MEA-NEA*, 251 Mich App 110, 115-116; 650 NW2d 120 (2002).

Although defendants did not interlocutorily appeal the circuit court's determination that an actual controversy existed, this Court must address that issue. See Dean & Longhofer, Michigan Court Rules Practice, § 2605.3, p 360 ("[I]t has been held that the requirement of an "actual controversy' is indispensable because of the constitutional limitation of the courts to the performance of judicial functions," citing *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 [1978].)

> The invariable practice of the courts is not to consider the constitutionality of legislation unless it is imperatively required, essential to the disposition of the case, and unavoidable. Thus, a court will inquire into the constitutionality of a statute only when and to the extent that a case before it requires entry upon that duty, and only to the extent that it is essential to the protection of the rights of the parties concerned. [*People v Higuera,* 244 Mich App 429, 441; 625 NW2d 444 (2001), quoting 16 Am Jur 2d, Constitutional Law, § 117, pp 512-513.]

"[T]he existence of an 'actual controversy' is condition precedent to invocation of declaratory relief." *Citizens for Common Sense in Government v Atty General*, 243 Mich App 43, 54-55; 620 NW2d 546 (2000), quoting *Kuhn v East Detroit*, 50 Mich App 502, 504; 213 NW2d 599 (1973). A case of actual controversy generally does not exist where the injuries sought to be prevented are merely hypothetical; there must be an actual injury or loss. *Id.* at 55; see also 16 Am Jur 2d, Constitutional Law, § 118, pp 514-515, and § 120, p 516:

> The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly, speculatively, or in the manner of an academic discussion. Once a statute has been violated, however, and the person violating it alleges that it is unconstitutional, the question of its constitutionality is no longer abstract, academic, or hypothetical, and a court then properly may proceed to reach the question of its validity.

In *BCBSM v Governor,* 422 Mich 1, 92-93; 367 NW2d 1 (1985), the Supreme Court stated:

> BCBSM argues that various sections of the act include vague and illusory terms, and thus unconstitutionally deny BCBSM sufficient warning of its duties under the act . . . .
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> * * *
>
> It is a general principle of constitutional law that statutory language must be sufficiently clear and definite to provide fair warning of proscribed conduct. However, as noted by this Court in *People v Howell,* 396 Mich 16, 21; 238 NW2d 148 (1976), statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand. The *Howell* Court cited *United States v National Dairy Products Corp,* 372 US 29, 32; 83 S Ct 594; 9 L Ed 2d

561 (1963), which further elucidates the problem associated with insubstantial vagueness challenges:

> "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were . . . presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." [Quoting *United States v Raines,* 362 US 17, 22; 80 S Ct 519; 4 L Ed 2d 524 (1960).]

> The present statute has not yet brought BCBSM and the Insurance Commissioner in to an actual adversarial relationship over the statutory terms. BCBSM is not yet defending its definition against a conflicting position asserted by the Insurance Commissioner. BCBSM hypothesizes areas of possible future confrontation, but on the present record we do not have an actual controversy to justify a constitutional analysis. [*BCBSM, supra* at 92-93.]

See also *Shavers, supra* at 588 (interpreting predecessor of MCR 2.605, GCR 1963, 521.1, and noting "[i]n general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights.")

A

Plaintiff maintains that the documentary evidence it submitted below established the existence of an actual controversy and that it was not simply presenting hypotheticals. We disagree.

Plaintiff submitted documentary evidence below of a 1990 incident where "a Kalamazoo lawn sprinkler company was threatened with criminal prosecution for mistakenly classifying its outside/underground lawn sprinkler installers as landscapers as opposed to landscaper 'specialists.'" Plaintiff submitted documentary evidence of the CIS' investigation thereof, and of a letter dated February 1, 1991, addressed to Western Michigan University, stating that an investigation had been completed of the prevailing wage complaint against the sprinkler company, that the contractor was found in violation of the PWA, and that the matter "has been referred to the Prosecuting Attorney." However, plaintiff presented no evidence that any further action occurred - - no evidence of a pending threatened prosecution or actual prosecution, and no evidence of a contract termination - - and plaintiff filed the instant complaint in 2000, almost a decade after the alleged sprinkler company incident.

Plaintiff also submitted below the affidavit of Gary Tenaglia, president of General Electric Contracting, an electrical contractor and member of ABC. Tenaglia averred that the vast majority of his company's work is on state funded construction projects subject to the PWA and that it intends to bid on future publicly funded construction projects. Tenaglia averred that in

order to avoid criminal prosecution and other sanctions under the PWA, his company "has complied with the mandates of the law where applicable," but that notwithstanding these efforts, he had nevertheless been subjected to criminal investigation and threatened with criminal prosecution by the Macomb County Prosecutor. Tenaglia averred that on or about February 1999, the CIS referred twenty-seven PWA complaints against General Electric Contracting to the Macomb County Prosecutor's office, alleging it had failed to pay the prevailing wage rate. The affidavit stated that on October 21, 1999, Tenaglia asked the prosecutor to refer the complaints back to the CIS for re-investigation because the CIS had made several errors, that the prosecutor did so, and that the CIS reinvestigated from October 1999 to March 2000, and then found there was no basis to pursue any of the complaints. As a result of the CIS's re-investigation, Tenaglia was found to have underpaid one claimant by only $10.56, and a second claimant by only $26.40. Tenaglia averred, however, that the Macomb County Prosecutor "continues to fail or refuse to dismiss the criminal investigation" of his firm and him.

Tenaglia also averred, without reference to dates, that before owning General Electric Contracting, he owned another electrical contracting company that had a collective bargaining relationship with the IBEW Local 58, that the CIS relied exclusively on that collective bargaining agreement (CBA) in determining wage and fringe benefits within IBEW Local 58's trade and geographical jurisdictions, and that defendant NECA and IBEW Local 58 collectively negotiated and agreed on certain worker classifications that were not disclosed to the CIS. As a result, Tenaglia averred, that "union contractors who are aware of these lesser rates are provided a distinct and significant competitive advantage over non-union contractors who are not a party to these collective bargaining agreements and, therefore, are unaware of these lower paid classifications." Finally, Tenaglia's affidavit averred that "IBEW Local 58 and signatory union contractors have collectively negotiated certain wage schemes also undisclosed to the CIS . . . which include 'market recovery plans' or 'job targeting plans,' which generally involves the IBEW making certain wage deductions from workers, and then transferring these monies to union contractors in the form of wage subsidies." Tenaglia averred that he had "reason to believe, based on information from others," that union contractors are permitted to pay a lesser wage and fringe benefits to workers within classifications that are required by CIS published wage and fringe benefits to be paid at a higher rate.

Plaintiff also submitted below the affidavit of Lee Goulet, stating that Midland Painting Company, of which Goulet was the owner and president from 1978 until August 2000, was awarded a bid on a state construction project, and that after Midland Painting completed the contract in September 1998, it was cited for allegedly violating the PWA by misclassifying workers as "painters" while applying a product called "Dryvit." Goulet averred that pursuant to a FOIA request he made in March 1999, he was provided a copy of the CBA of the Painters Union, Local 1011, and that he had "reason to believe" that the CIS had relied on that CBA, in part, in citing him for violating the PWA. Goulet averred that he learned that a trade jurisdictional dispute existed between the Painters Union, Laborers Union, Carpenters Union and Lathers Union over the application of the product known as Dryvit, and that each of these groups had made claims to such work. Goulet averred that all of the information contained in the instant affidavit was presented to the CIS, and that notwithstanding that a trade jurisdiction dispute existed and that "it was patently uncertain as to the appropriate worker classification to be used to apply Dryvit, the CIS nevertheless concluded its investigation by advising claimants to pursue their claims criminally through the Mackinac County Prosecutor."

Goulet's affidavit was signed in December 2000, but makes no mention of a threatened or actual prosecution having occurred. We agree with defendants that neither Goulet's nor Tenaglia's affidavit supports that there was an actual or threatened prosecution based on violation of the PWA. Nor does the remainder of plaintiff's documentary evidence, which consisted of a copy of a collective bargaining agreement, a CIS prevailing wage rate chart for Midland County dated January 1, 2000, a United States Department of Labor prevailing wage rate schedule that expired in 1990, a CIS memo discussing overtime provisions, and portions of testimony given in a Department of Labor proceeding in Bay City Michigan in May 1999. Some of these exhibits were submitted in support of plaintiff's arguments that it is difficult to understand the CIS' worker classifications and the collective bargaining agreements on which the CIS relies in setting prevailing wage rates.

The collective bargaining agreement plaintiff submitted below was between the International Union of Operating Engineers and the Associated Underground Contractors, effective from September 1, 1997-September 1, 2000, and applicable to underground contracting work in Midland County.

The CBA contained a "market recovery" provision:

> **Section 7. MARKET RECOVERY PROGRAM**
>
> It is recognized by the parties that in certain areas of the state, the Union construction market has been threatened by non-union competition. Where the mutual interests of the Union and the Association are served by cooperating to enable Association Contractor members to compete more effectively, it is agreed that a two (2) person panel, one (1) from the Association and one (1) from the Union, will meet to negotiate a market recovery rate and/or terms and conditions on a job by job or on an area basis. A committee comprised of two (2) members of the Association and two (2) members of the Union will meet periodically, but not less than twice annually to discuss any problems with the market recovery system. The Union shall provide notification to the Association of all market recovery rates.

Plaintiff argues on appeal that:

> An addendum [to the above quoted CBA] *undisclosed to the CIS* provides for a wage and fringe benefit rate of several dollars less per hour to be applied where a contractor/member of the Underground Contractors is bidding a project against non-union competition. At least one underground contractor who is a party to the agreement can testify that he and the union have agreed to use the lower rates found in the addendum when the contractor attempts to secure non-prevailing wage work, including Midland County. His testimony would also show that since the vast majority of underground construction work performed in Midland County is private construction to which the PWA does not apply, virtually every non-prevailing wage project bid and performed by this contractor in the county is under the reduced rates in the addendum to the contract. Yet, all construction work on state-funded projects subject to the PWA must be paid at the higher wage and fringe benefits rates found in the collective bargaining agreement disclosed to

> the CIS, in lieu of the much lower rates typically paid pursuant to the undisclosed addendum agreement.

Regarding the CBA plaintiff submitted below, as the circuit court's opinion noted, plaintiff acknowledges that market recovery programs do not violate antitrust laws and may constitute protected concerted activity under the National Labor Relations Act. Further, plaintiff submitted no evidence linking the CBA or the addendum it alleges went undisclosed to the CIS to any actual loss, injury, or threatened or actual prosecution under the PWA.

Plaintiff's argument on appeal continues that, under *MSBCTC and Resteel Contractors Assoc v Perry*, 241 Mich App 406; 616 NW2d 697 (2000), the CIS has no discretion to vary from the terms and conditions expressed in union collective bargaining agreements, and:

> since the CIS is powerless to do anything but transfer classification and wage rate information it receives from [unions and unionized contractors] to the wage report, *Resteel, supra,* the reports consequently and necessarily contain no more and no less than the unions and unionized contractors want them to contain. Thus, unions and unionized contractors never submit the lower wage rate information stemming from their market recovery programs. What explanation *other than collusion* can explain this failure to provide such critical wage and benefit rate information to the CIS?
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> * * *
>
> In their Brief at page 16, the Intervenors argue (hypothesize, really) that the CIS has discretion to accept several rates from the unions and union contractors and then to determine based on percentages which rate would be applicable to public works projects. Of course, such hypothetical discretion was foreclosed by the Michigan Court of Appeals in Resteel, *supra.* There, the CIS attempted to exercise some discretion in defining overtime and similar terms only to have the MSBCTC (an intervenor in this present case) file a lawsuit challenging such discretion. The Court examined the statute and agreed with the MSBCTC that the CIS was required to define such terms exactly as the unions had defined them in their collective bargaining agreements. Id. at 416. The MSBCTC can't reverse course now through intervention into this present lawsuit and claim that the CIS has discretion to determine prevailing wages in a manner other than exactly as the unions specify those particular rates in their agreements and understandings. . . .

We reject this argument as well. *Resteel, supra,* did not eliminate the CIS' discretion to accept several rates from unions and union contractors and then to determine which rate would be applicable to public works projects. In *Resteel,* MSBCTC and Resteel Contractors Association challenged a change in the CIS' department policy regarding the establishment of prevailing wage rates and fringe benefits. This Court affirmed the granting of declaratory and injunctive relief to the plaintiffs, noting in pertinent part:

> Before July 1994, the department established all prevailing wage and fringe benefit rates according to the rates in local collective bargaining agreements as reported in a survey circulated by the department. The survey form used before

July 1994 asked for information regarding fringe benefit const contributions in the following categories: "health and welfare," "vacation," "pension," "training fund," and "other." That survey also requested information regarding the daily, weekly, Saturday and Sunday and holiday overtime pay requirements in those agreements.

In July 1994, the department began implementing new policies regarding its determination of prevailing wage and fringe benefit rates. The department determined that prevailing overtime wage rates would uniformly consist of time-and-one-half after forty hours a week, rather than the varying daily, weekly, Saturday, and Sunday and holiday overtime requirements often found in collective bargaining agreements, and that the fringe benefits considered in setting the prevailing rates would be limited to three categories: health and welfare, vacation and holiday, and pensions benefits. Under this revised policy, contributions for apprenticeship and training, labor-management cooperation committees, and supplemental unemployment benefits required under many collective bargaining agreements would not be included in the department's calculations of prevailing fringe benefits rates.

* * *

Defendants argue on appeal that because the PWA requires that the department determine the prevailing wage and fringe benefit rates, but does not define the terms "overtime," or "fringe benefit," the department has discretion to define what constitutes "overtime" and a "fringe benefit" under the PWA and apply those definitions in establishing prevailing wage and fringe benefit rates. . . . .

* * *

We address first defendants' argument with regard to overtime wages. Defendants contend that because the PWA contains no definition of the term "overtime," the department may rely on the definition found in the Minimum Wage Law . . . and apply that definition uniformly in establishing prevailing wage rates, irrespective of the specific provisions regarding overtime pay found in many collective bargaining agreements. We disagree. The plain language of the PWA specifically provides that the department *shall* establish the prevailing wage and fringe benefit rates at the same rates as in local collective bargaining or similar agreements. The word "shall" is generally used to designate a mandatory provision. Moreover, this Court has previously determined that the department's discretion in establishing prevailing wages under § 4 is extremely limited.

> The Michigan Legislature has not delegated any legislative, policy-making authority to the Department of Labor. The Legislature has declared as the policy of this state that construction workers on public projects are to be paid the equivalent of the union wage in the locality . . . The Department is merely authorized to implement what the Legislature has already declared to be the law in Michigan.

> . . . [T]he statute expresses the policy that wages equal to union scale are to be paid to both union and nonunion workers on public construction projects. . . . [The Legislature] merely adopted, as the critical standard to be used by the Department of Labor in determining prevailing wage, the wage rate arrived at through a collective bargaining process . . . . [*West Ottawa Public Schools v Director, Department of Labor*, 107 Mich App 237, 245-246; 309 NW2d 220 (1981).]

> Overtime wages clearly fall within the category of wages to be included when determining prevailing wage rates. Further, there is no question that collective bargaining agreements contain very specific provisions regarding overtime pay and that those provisions may contain variable overtime rates. We conclude, therefore, that under the unambiguous language of the PWA, the department, in establishing prevailing wage rates, has no discretion to depart from the wage provisions in local collective bargaining agreements by defining "overtime" in a manner inconsistent with those agreements.

> * * *

> We conclude that under the plain language of the PWA, the department is without discretion to define wages, including overtime, or fringe benefits independently of the collective bargaining agreements in the locality. Rather, in determining prevailing wage and benefit rates, the department is bound by the wage and fringe benefit requirements found in local collective bargaining agreements. Accordingly, we find that the circuit court did not abuse its discretion in issuing a writ of mandamus requiring defendants to reinstate its previous procedure for establishing prevailing wages, in entering a declaratory judgment that defendants' revised policy regarding calculation of fringe benefits was invalid and unlawful, or in granting injunctive relief in favor of plaintiffs requiring defendants to include in the determination of prevailing fringe benefits rates the rates applicable under collective bargaining agreements for apprenticeship, training, supplemental unemployment, and labor-management cooperation committees. [*Resteel*, 241 Mich App at 408-416.]

Resteel does not prevent the CIS from considering several wage rates from collective bargaining agreements or understandings. Nor does *Resteel* foreclose the CIS from requesting full disclosure from unions and union contractors regarding wage rates; the *Resteel* Court's determination was that the CIS is "without discretion to define wages, including overtime, or fringe benefits independently of the collective bargaining agreements in the locality. Rather, in determining prevailing wage and benefit rates, the department is bound by the wage and fringe benefit requirements found in local collective bargaining agreements." *Id.*

B

The circuit court allowed plaintiff's claim that the PWA constituted an unconstitutional delegation of legislative authority to proceed to discovery, relying in large part on *General Electric v New York Dep't of Labor*, 936 F2d 1448 (CA 2, 1991). However, unlike the instant

case, *General Electric* involved an actual controversy: General Electric had been awarded a public works contract, had performed the contract and, after payments to it were withheld by the state of New York based on its alleged underpayment to workers, brought suit.[6]

We conclude that plaintiff did not establish that there was an actual or imminently threatened prosecution of any of its members, nor has plaintiff shown that a declaratory judgment or decree is necessary to guide its future conduct in order to preserve its legal rights with respect to any particular contract or bid. Absent an actual controversy the circuit court lacked subject matter jurisdiction to enter a declaratory judgment, *McGill v Automobile Ass'n of Michigan*, 207 Mich App 402, 407; 526 NW2d 12 (1994), and this Court lacks jurisdiction and thus may not consider plaintiff's constitutional challenges. See *BCBSM, supra* at 92-93, and other cases discussed in Section III, *supra*. In light of our disposition we need not consider the remaining issues.[7]

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[6] *General Electric* addressed whether a New York state statute violated the Fourteenth Amendment of the federal constitution, and is neither of precedential value or binding on Michigan courts. More fundamentally, however, *General Electric* is distinguishable because there the court was presented with an actual controversy. 936 F2d 1458-1459. Further, it appears that the New York statute challenged in *General Electric, supra,* did not contain a provision analogous to that in Michigan's PWA stating that "[s]uch [collective agreements or understandings between bona fide organizations of construction mechanics and their employers], to meet the requirements of this section, shall not be controlled in any way by either an employee or employer organization." MCL 408.554.

[7] With respect to plaintiff's cross-appeal, which argues that the PWA is unconstitutionally vague, both on its face and in application, we note that generally, "[t]he party challenging the facial constitutionality of an act 'must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . '" *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999), quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). "Statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *BCBSM, supra* at 93, quoting *People v Howell*, 396 Mich 16, 21; 238 NW2d 148 (1976).

> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process; however, to succeed, the complainant must demonstrate that the law is impermissibly vague in all of its applications. [16B Am Jur 2d, § 920, p 516, citing *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc*, 455 US 489; 102 S Ct 1186; 71 L Ed 2d 362 (1982).]

In the instant case, because the PWA does not implicate constitutionally protected conduct, plaintiff may bring a facial challenge only if it demonstrates the law is impermissibly vague in all of its applications. Because plaintiff neither argues nor supports that the PWA is impermissibly vague in all of its applications, its facial challenge on vagueness grounds fails.

Plaintiff's claim that the PWA is unconstitutional "as applied" also fails because plaintiff has not alleged any "facts of the case at hand" which would allow this Court to analyze an "as applied"

(continued…)

We affirm the dismissal of plaintiff's vagueness challenge and reverse the denial of summary disposition as to plaintiff's delegation challenge.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Pat M. Donofrio

(…continued)

challenge in anything but a hypothetical context. See *BCBSM, supra.*

In a supplemental authority brief, plaintiff cites *People v Barton*, 253 Mich App 601; 659 NW2d 654 (2002), and *People v Boomer*, 250 Mich App 534; 655 NW2d 255 (2002), as supporting its position. Plaintiff is incorrect, as the statutes challenged in those cases affected First Amendment interests. The ordinance challenged in *Barton* prohibited "any indecent, insulting, immoral, or obscene conduct in any public place." The *Barton* Court stated "[w]e note that defendant may challenge the ordinance as unconstitutionally vague on its face because it threatens First Amendment interests." 253 Mich App at 605. The statute at issue in *Boomer* provided that "[a]ny person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor." The *Boomer* Court noted that the statute "impinges on First Amendment freedoms" in that it unquestionably "reaches constitutionally protected speech." 250 Mich App at 542.